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MANIPULATING THE MEDIA: VICTORIAN LAWYERS, TRANSPORTATION, AND THE CREATION OF PANIC OVER HABITUAL CRIMINALS

Judith Rowbotham[1]

Abstract

This article explores the largely forgotten attempts by key members of the legal profession in mid-nineteenth England to bring about a government rethink on the decision to abandon transportation. By creating alarm and despondency about the danger posed by introduction of the ticket-of-leave system to the United Kingdom, they hoped to generate popular pressure for a continuation of transportation overseas. To achieve this, the legal profession made use of their influence over the content of crime reportage to challenge the assurances given by figures like Colonel Jebb about the positive early results of domestic penal servitude and to generate widespread concern about the transference of a convict stain back to the UK. A number of destinations were suggested, with serious consideration being given to both the Falkland Islands and Vancouver Island. The attempt to establish a mass-based popular movement to continue transportation failed, but the result was an enduring legacy of public alarm over recidivism and its threat.

Keywords

Transportation; crime reportage; ticket-of-leave system; legal profession; habitual criminality.

Introduction

Much research has been done on convicts who were transported to Australia, with a recent focus on their individual life course histories made possible thanks to the Digital Panopticon project.[2] The history of the impact of the transportation project and its ending on Australia itself has been scrutinised, in terms both of its contemporary impact on law

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[2] There has been a steady stream of publications from the mid-1960s on this subject, though the outstanding work in terms of promoting a modern understanding was undoubtedly Robert Hughes, *The Fatal Shore* (Collins Harvill, 1987). However, the range and complexity of work has become particularly impressive in the last five years in association with the Digital Panopticon project. See https://www.digitalpanopticon.org/ [Accessed 18 December 2018].

and society and of the longer term significance of the 'convict stain' on national identity.[3] However, there has not been the same detailed and nuanced scrutiny on the impact on Britain of the introduction of domestic penal servitude in the context of the evolution of the modern prison system, and the legacy of that impact for attitudes to recidivism into the present. The work done focuses mainly on reactions to the introduction of penal servitude within a national prison system, and concerns over the parole or ticket-of-leave system, starting with the conclusion that there was no practical alternative to the establishment of penal servitude at home.[4] This article takes a different stance, where the ending of transportation is not taken for granted. It is easy, in retrospect, to see why the government came to this conclusion, in the light of economic realities and the lack of popular pressure for its continuation. But what this has meant is that scant attention has been paid to the significant opposition to the ending of transportation within Britain that emanated particularly from within the legal profession, and to the impact this legally-driven hostility had on the delivery of the criminal justice system and popular perceptions of domestic penal servitude. This article seeks to begin to remedy this by examining the reaction of many members of the legal profession, assessed through their campaign to continue transportation to a fresh destination, and the associated use of the mass media to raise levels of public concern over the negative effects of recidivist criminality being let loose on the nation were transportation not to be restored.

1 Background

Between the late 1840s and the early 1870s, there was a concerted campaign to alarm the public about the levels of criminality within the nation if domestic penal servitude for those convicted of serious crimes or displaying persistent criminality became the norm. This partakes, to a considerable extent, of the idea of the moral panic in that it relates (according to the classic definition) to the emergence of 'a condition, episode, person or group of persons' who 'become defined as a threat to societal values and interests', one

[3] See, for instance, David Cox, Barry Godfrey, Helen Johnston and Joanne Turner, 'On licence: understanding punishment, recidivism and desistance penal policy, 1853-1945', in Vivien Miller and James Campbell (eds.), *Transnational Penal Cultures: new perspectives on discipline, punishment and desistance* (Routledge SOLON, 2014), pp.184-201; Barry Godfrey, '"Convict Stain": Desistance in the Penal Colony' in Judith Rowbotham, Marianna Muravyeva and David Nash (eds.) *Shame, Blame and Culpability: Crime and Violence in the Modern State* (Routledge SOLON, 2012), pp.96-108.

[4] A recent example here is also provided by Philip Harling's article, on the extent to which the British Empire shaped reactions to the ending of transportation: See Philip Harling, 'The Trouble With Convicts: From Transportation to Penal Servitude', *Journal of British Studies,* 53 (2014), 80-110.

that is not necessarily new in terms of the threat, but has been roused from dormancy by events.[5] Reflecting back on the concept of moral panic in 2011, in the introduction to the third edition of his famous work on Mods and Rockers as an example of the phenomenon, Stanley Cohen pointed out the accompanying assumptions about the nature of what is often so labelled. First, that the actual threat of the panic-causing incidences have been exaggerated and second, that these act as indicators of more important underlying issues to be addressed, with both assumptions framed by an implicit message that liberal reforming measures are 'wilfully' ignoring justified public anxieties on these fundamental concerns about, say, youth, delinquency or criminality.[6] These criteria undoubtedly characterise much of the popular alarm voiced in the national press surrounding the ending of transportation as a permanent way of removing serious and persistent criminals from British society.

However, though tempting, it is not claimed here that this is another example of a moral panic in the classic Cohen mould. Instead, it is hoped that one consequence of this approach which, while invoking the spirit of moral panic, does not seek to claim that it is a clear example thereof is that it can open up debates over popular panic. In particular, that it will encourage an examination of how the consequences of panic-inducing media comment can have unanticipated consequences, in terms of the directional focus of public anxieties, and public policy strategies arising from this. One of the key objectives for this article is to reveal the gap between the intentions of those deliberately arousing mass anxiety, using the media to shape this, and the actual outcomes. It suggests that we cannot assume that there is not an automatic corollary between the objectives of those responsible for initiating and shaping an incident of public alarm and the actual after-effects.[7] In this case, the goal of the promoters of panic was the creation of a public pressure movement to restore penal transportation overseas to a suitable new

[5] Stanley Cohen, *Folk Devils and Moral Panics: the Creation of the Mods and Rockers* (Blackwell, 1987), p.9.
[6] Stanley Cohen, 'Third Introduction', *Folk Devils and Moral Panics: The Creation of the Mods and Rockers,* 3rd edn (Routledge Classics, 2011), pp.1-3.
[7] It should be remembered that contemporaries were very conscious of the impacts on political policy of mass pressure groups – the success of the abolitionist movement, but also of the pressure groups pushing for franchise reform as well as the Anti-Corn Law movement provided object lessons here. See, amongst others, Geoffrey Alderman, *Pressure Groups and Politics in Nineteenth Century Britain* (Addison-Wesley Longman, 1984); Wyn Grant, *Pressure Groups and British Politics* (Palgrave Macmillan, 2000); Aled Jones, *Powers of the Press: Newspapers, Power and the Public in Nineteenth Century Britain* (Scolar Press, 1996).

destination.[8] In fact, the consequences manifested themselves in the shape of a focus on the management of the habitual criminal still within the domestic context. The manifestation of an increasing popular panic about recidivist criminality from the 1850s into the early 1870s provides the necessary context through which we can best understand government thinking behind what can only be called the failed legislative experiment of the Habitual Criminals Act 1869. This article is, therefore, not so much about a case study of this popular concern as a critical survey of the thinking and agenda of those consciously promoting what might easily be labelled a moral panic over the ending of transportation.

Crime and deviance are always fruitful fields for generating high levels both of popular fascination and of concern about the potential they have for a negative impact on individuals and community welfare. When crime and deviance can be associated with a change in policy on their management, they can become fertile ground for promoting popular alarm as a way of providing sufficient public pressure to bring about a reversal of proposed policy change. The ending of transportation provides a fine example of such an episode. The starting point must be that Britain had, by the 1840s, been long accustomed to managing those identified as actually or potentially the most egregious of criminals by removing them via transportation overseas, most recently to Australia. But, in 1840, New South Wales became a free settler colony with the ending of transportation there, Other Australian colonies also gave notice that they, too, would be following suit, forcing the British government to rethink its reliance on transportation.[9]

2 Sounding the Alarm: the End for Transportation Overseas

This development came at a time, the late 1830s, when there were already pressures in government to rethink both the expense and the actual value of transportation. Some concern, from the start, had been expressed over the actual transportation process. Pressure for abolition of the slave trade, which included humanitarian concerns over the ship-board conditions in which slaves were conveyed across the Atlantic, had become a major national movement by 1788, the year when the First Fleet of convict transports

[8] There was, as this article discusses in detail later, considerable debate over whether that destination should continue to be in Australia, given Western Australia's initial willingness to continue accepting transportees, or whether a new destination should be sought, more resembling the French penal colonies like New Caledonia.

[9] For the precise details of the ending of transportation to Australia, including the continuation as a temporary measure to Western Australia, see Hughes, *Fatal Shore*.

arrived in Australia.[10] In pointing to the considerable contemporary publicity given to this issue and the parallels that could be drawn with the slave trade, Emma Christopher establishes that there was a degree of popular unease with this penal adventure from the start.[11] An attempt was made to reassure popular opinion by undertaking an evaluation of transportation in the aftermath of the Napoleonic Wars, conducted from 1819 under the leadership of John Bigge (former Chief Justice, Trinidad). This did provide a reassurance of the improved conditions during the voyages, something which many of the previous abolitionist activists had turned their whole attention to after the Slave Trade Abolition Act 1807.[12] However, the bulk of the Bigge Report shifted British domestic attention away from actual transportation and its mechanics onto the potential for savings to the taxpayer derived from reforming what were presented as the overly lenient conditions (and consequent lack of reformative impulse) obtaining there.[13] The result was implementation of many of the recommendations of the Bigge Report making conditions harsher for convicts. Notably a significant distinction between emancipated felons and free emigrants was made, a development which aroused hostility not only in Australia but also in the UK.[14] Comparisons were again made with slavery but this time in the context of the drive to rid the Empire of the moral stain of slavery itself, rather than the trade. For many liberals associated with anti-slave emancipation activity, the reports from the penal colonies (especially revelations about Norfolk Island) made uncomfortable reading during the 1820s and early 1830s.[15] The Liberal (Whig) government contained men who were not only dedicated to the eradication of slavery but were also determined to expose its evil echoes with transportation, conjuring up what

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[10] Seymour Drescher, *Econocide: British Slavery in the Era of Abolition* 2nd edn, (University of North Carolina Press, 2010), p.38; J.R. Oldfield, *Popular Politics and British Anti-Slavery: the mobilisation of public opinion against the slave trade 1787-1807* (Routledge, 1998), pp.163-167.
[11] Emma Christopher, '"The Slave Trade is Merciful Compared to [This]": Slave Traders, Convict Transportation and the Abolitionists', in Emma Christopher, Cassandra Pybus and Marcus Rediker (eds.), *Many Middle Passages: Forced Migration and the Migration of the Modern World* (University of California Press, 2007) pp.109-128 (see especially pp.109-111).
[12] Christopher, '"The Slave Trade is Merciful Compared to [This]", p.124; see also *New South Wales. Report of the Commissioner of Inquiry into the State of the Colony of New South Wales* (London: House of Commons, 1822), Section II, available at http://gutenberg.net.au/ebooks13/1300181h.html#ch-10 [Accessed 20 December 2018].
[13] See John Hirst, *Freedom on the Fatal Shore* (Black Inc, 2008); Babette Smith, *Australia's Birthstain: The Startling Legacy of the Convict Era* (Allen and Unwin, 2008), pp. 119-124; 140-142; Tom Lawson, *Last Man Standing: A British Genocide in Tasmania* (I.B. Tauris, 2014), p.39.
[14] For more on this, see Raymond Evans, '19 June 1822: Creating an "Object of Real Terror": the tabling of the First Bigge Report', in Martin Crotty and David Roberts (eds.) *Turning Points in Australian History* (University of New South Wales Press, 2009), pp.48-61.
[15] Hughes, *Fatal Shore*, p.484.

were, for British audiences, emotive claims of penal servitude in Australia amounting to white slavery.[16] The setting up of the Molesworth Committee in 1837 was one tactic for achieving this.[17] Sir William Molesworth was charged with the task of enquiring into transportation in terms of its efficacy as punishment but also, and tellingly, with assessing its impact on 'the Moral State of Society' in penal colonies, and the potential there was for reforming and improving the system.

Molesworth was an established political radical, one powerfully influenced by Bentham's ideas and already convinced of the superiority of instituting a penitentiary system in Britain. Entrusted with this task, Molesworth zealously (and successfully) set about painting the transportation system in the darkest of hues. Though based on exaggerations of the level of abuse as representing a typicality of convict experience, his Report, published in 1838, shocked many both in Australia and Britain with its revelations.[18] Its key recommendation urged the ending of transportation to New South Wales by 1840. While transportation continued for a time, in modified format, it was widely accepted in political circles by the mid-1840s that it could not be continued for long. An 1853 editorial in *The Times* triumphantly welcomed the ending of transportation to Van Dieman's Land (Tasmania) as 'the victory of right and justice' in that the system had been 'a system of slavery' up to 1840, and even in an ameliorated form had created 'odium'.[19] Numbers diminished dramatically, from 1853 it continued only to Western Australia with the last convict ship landing there in 1868.[20] Meanwhile, official government policy concentrated on developing a home-based system where transportation would be replaced with what came to be known as domestic penal servitude within a penitentiary format.

The difficulty that government faced was finding an alternative sentencing strategy that was affordable and acceptable not just to an expanding electorate but also to the legal

[16] Stephen Nicholls, 'The Convict Labour Market' in Stephen Nichols (ed.), *Convict Workers: Reinterpreting Australia's Past* (Cambridge University Press, 1988), pp.111-126, (see pp.111-112).
[17] See, for instance, Saxe Bannister, *On abolishing transportation and on reforming our Colonial Office: a Letter to Lord John Russell* (Effingham Wilson, 1837). Formerly Attorney General of New South Wales, but having returned to London in 1826, Bannister was a regular reforming activist in British political and legal circles, and very much known for his radical views.
[18] Sir William Molesworth, *Report from the Select Committee of the House of Commons on Transportation* (Henry Hooper, 1838); see also Hughes, *Fatal Shore*, p.494.
[19] Editorial, *The Times*, 21 February 1853.
[20] Editorial, *The Times*, 21 February 1853.

profession. Government options were narrow by the mid-century. By the 1840s, with the effective final demolition of the so-called Bloody Code, the option of execution as an everyday remedy for crimes other than murder or unusual actions such as treason and piracy had disappeared. It was impracticable to think of its restoration, especially as there was greater clamour (certainly in terms of popular commentary) for the complete abolition of the death penalty than there was for a restoration of its use as the default sentence even for recidivists.[21] *Faut de mieux*, almost, the government or political decision was to expand the hitherto small experiment in penal servitude as the way forward; making a prison sentence the 'normality' after conviction for a serious felony, and not just one of the options drawn on by the summary courts for dealing with summary or non-serious offending.[22]

3 Finding an Alternative

Policy-makers looked to historical models, including the discussions on domestic-located penal policy that had largely been put on ice since the late eighteenth century. A move in that direction, supported by John Howard and William Blackstone, had been made back in the late 1770s, resulting in the Penitentiary Act 1779 which envisaged the building in London of two penitentiaries (one for men, one for women). A temporary alternative to transportation came with the Hulks Act 1776, which (in line with Benthamite thinking) had introduced the concept of hard labour for stay-at-home incorrigibles. Designed to be both reformative and deterrent, hard labour was from the start a key part of the new thinking of those advocating a British-based penal strategy.[23] Women, and physically unfit males, sentenced to hard labour would be incarcerated in local gaols or houses of correction for that purpose. For the 'fit' males, hard labour entailed being sent to the hulks, an experience which involved being housed in rotting ships, beached because no longer seaworthy, and undertaking labour onshore, including tasks such as dredging navigable rivers, notably the Thames. But there was, from the start, doubt (especially amongst politicians and within the legal profession) that long prison sentences would work as

[21] See Judith Rowbotham, 'Execution as Punishment in England, 1750-2000', in David Nash and Anne-Marie Kilday (eds.) *Histories of Crime. Britain 1600-2000* (Palgrave, 2010), pp.180-202.
[22] It is worth noting that from 1842 on, the British government was clearly diminishing its commitment to transportation overseas. Between 1848 and 1853, only 10962 of the 16229 sentenced to transportation actually left British shores. See Peter W.J. Bartrip, 'Public Opinion and Law Enforcement: the Ticket of Leave Scares in Mid-Victorian Britain' in Victor Bailey (ed.) *Policing and Punishment in Nineteenth Century Britain* (Croom Helm, 1981), pp.150-181, p.155.
[23] For a more detailed discussion of Bentham's ideas, see Janet Semple, *Bentham's Prison: A Study of the Panopticon Penitentiary* (Clarendon Press, 1993), especially pp.98-99.

commentators like Jeremy Bentham had claimed and bring about the rehabilitation of criminal incorrigibles into useful members of society.[24] What had made the hulks acceptable to those worried about the threat potentially posed by their inhabitants were the appalling conditions in them, and the consequent high death rates of their inhabitants.[25]

The renewal of transportation was also envisaged as providing a more permanent solution than transportation to the Americas had been when on completion of sentence, it had been possible for transportees to return to England, as Defoe's heroine Moll Flanders had done.[26] From 1787, for the first time, a sentence of transportation was intended to provide a permanent solution to the management of incorrigibles in British society in that even after completion of the term of penal servitude in Australia, the transportee could not return to any part of the kingdom, with violation being punishable by death (the original sentence anyway for many transportees). Experiments with penal servitude at home may have continued on a minor scale, for example, the opening of Millbank Prison in 1821 with a capacity of 860, however, the general consensus was that transportation 'solved' the problem of the incorrigible criminal, removed from Britain in their thousands – only for that consensus to dissipate in the late 1830s.

The opening in 1842 of a second national convict prison in the shape of Pentonville, with a capacity of 520 marked the beginnings of a prison building programme, resulting in the creation of an all-embracing mass prison system where 116 institutions of varying sizes were in place by the end of the century. As well as expanding and improving existing local gaols, and building new ones, the state took on the responsibility for the creation of a national network of convict prisons for the long-term incarceration of serious offenders. This was at a time when the overwhelming majority of prison sentences, mainly awarded by the summary courts, were for a month or less. The Penal Servitude Act 1853 made it plain that the new domestic location for imprisonment was 'in lieu of transportation'; an initial move that was finalised in the Penal Servitude Act 1857. This last Act formally

[24] Semple, *Bentham's Prison*, pp.164-165; see also Jeremy Bentham, *Introduction to Principles of Morals and Legislation* (Clarendon Press, 1907).
[25] See Charles Campbell, *The Intolerable Hulks: British Shipboard Confinement 1777-1857* (Heritage Books, 1993).
[26] Daniel Defoe, *The Fortunes and Misfortunes of the Famous Moll Flanders* (Oxford University Press, 1988). Defoe's depiction of transportation is of people returning after making a success of themselves in North America. This utopian vision was not, of course, the standard in reality.

ended transportation overseas for life as an option for those convicted of an indictable offence, meaning that for the last decade of its existence transportation was, officially, penal servitude abroad.[27]

What was, in terms of the English experience of penal policy, original about penal servitude at home rather than overseas was the idea built into it from the start that, unlike transportation from the late eighteenth century on, it did not constitute a permanent removal of the offender from society. Transported felons had enjoyed the privilege of release on licence or 'ticket-of-leave' for good behaviour or on completion of sentence, but that licence was confined to Australia.[28] If they violated the transportation sentence and returned to Britain, as in the example of Dickens' convict, Abel Magwitch, then they were liable to a capital penalty. As such, transportation was seen, to use Dickens own words, as the 'solution for all social problems for England'.[29] However, the new mass penal servitude initiative saw a repatriation of this licence. A founding feature of the home-based prison sentences, including those for repeat offending, was the expectation of release from that sentence back into the society where they had committed their crimes.

4 The Home-Based Opposition to Home-Based Sentences

What has been less well understood by the scholarship exploring the ending of transportation and the beginning of the modern, prison-based, punishment system is that not all were as convinced as leading politicians and figures in the Home and Colonial Offices that transportation should be replaced by a reliance on a version of the penitentiary system. In their comments on the two crucial decades, 1850s and 1860s, Radzinowicz and Hood refer to legal professionals and the disagreement in their ranks over what would constitute the best alternative to transportation to Australia when it came to dealing with incorrigibles. Amongst the leading legal figures with a political profile who were publicly hostile to the ending of transportation were the noted legal reformer Lord Brougham and Lord Campbell, the former Attorney General and subsequent promoter of the Obscene Publications Act 1857, as well as figures like Sir

[27] This was aimed at fit men, who could be sent to labour on colonial government projects such as the docks at Bermuda.
[28] See Mark Finnane, *Punishment in Australian Society* (Oxford University Press, 1997).
[29] Charles Dickens, *Great Expectations* (Chapman and Hall, 1861); Coral Lansbury, 'Charles Dickens and His Australia', *Journal of the Royal Australian Historical Society,* 52 (1966), 115-127.

William Hardman and their political supporters including Sir John Pakington, MP for Droitwich and long-standing Chairman of the Worcestershire Quarter Sessions and Richard Spooner, MP for Birmingham and local magistrate.[30] Such men saw no reason why it should not be possible to bring pressure to bear on Parliament via the media to reverse the decision to end transportation, even if it could not continue to the existing Australian colonies. In this they were also aided by figures like Matthew Davenport Hill, the vocal legal reformer and Recorder for Birmingham.[31] The most favoured new destination in the eyes of such men was the Falkland Islands, on the grounds that substantial free emigration was unlikely to choose those remote and uncomfortable islands.[32]

A challenge for the opponents of the ending of a system of transportation overseas to penal colonies was that, as initial press comment underlined, its ending was widely felt to be a positive move. Comment in titles from the working-class orientated *Reynolds News* to elite-targeting *Times*, reveals how well entrenched, by the beginning of the 1850s, was the belief that the Molesworth Report had been accurate.[33] Nor was there, initially, widespread popular concern over the domestic location of the new regime of penal servitude.[34] It was, as a preliminary, therefore necessary to alarm the public about the impact that ticket-of-leave felons would have, once released, and a hint of the importance of this strategy is gained from the parliamentary debates in August 1853 on the Transportation Bill. These members of the legal profession consciously looked to be aided in their campaign to restore transportation by use of the national press, because of the numbers of Victorian lawyers who acted as reporters and journalists (including being leader writers) and did so anonymously.[35] Numbers of them (it is unknown, because of

[30] Pakington served as Secretary of State for War and the Colonies in 1852, and Secretary of State for War 1867-68. On losing his seat in 1874, he became Baron Hampton. Spooner was also a leading anti-Roman Catholic activist.
[31] For more on this significant Victorian legal reformer and activist, see Florence Davenport Hill, *The Recorder of Birmingham: a Memoir of Matthew Davenport Hill with Selections from His Correspondence* (Macmillan, 1878).
[32] L. Radzinowicz and R Hood, 'Incapacitating the Habitual Criminal: the English Experience', *Michigan Law Review,* 78, (1980), 1305-1389.
[33] See, for instance, Editorial, *Reynold's News*, 21 December 1851.
[34] See the approving comments made in a number of editorials on the apparently positive experience associated with the new regime, for instance 'Prisons and Discipline', *The Times*, 2 September 1851; 'Prisons and Prison Discipline', *Morning Advertiser*, 3 September 1851.
[35] For more on this dimension to Victorian reportage, see Judith Rowbotham, Kim Stevenson and Samantha Pegg, *Crime News in Modern Britain: Press Responsibility 1820-2010* (Palgrave Macmillan, 2013).

the anonymity, precisely how many) were convinced to sound an alarm about the negative impacts of the ending of transportation. The fact that they could guarantee the anonymity of the majority of their contributions to the creation of a level of public concern about the domestic effects of ending transportation was essential. It meant that the general public could become excited about a specific issue or incident without any particular professional individuals or groups being identified and criticised for acting inappropriately. The primary focus of the remainder of this article is on the usage of the national media by lawyers, through their roles as reporters and journalists, to present an apparently disinterested case arguing that the mid Victorian plans for relying on domestic penal servitude rather than transportation for dealing with serious and in particular repeat offenders was detrimental to the security and happiness of the community.

5 Creating Popular Alarm

With echoes of the work done on moral panic in the background, this model can provide useful insights into the complexities surrounding this high profile campaign, popular reaction to it, and how such campaigns can create a demand for unnecessary new laws or even damage to existing legislation. The point is that such episodes rarely, if ever, arise spontaneously out of popular feeling. There may be unease about a new development or proposed reform. But in the overwhelming majority of cases, the populace has to be informed that their unease derives from a particular cause; that the inchoate unhappiness with the current state of society shared by consumers of news via the media stems from a particular issue and most specifically, from the flawed way that it is being handled by the relevant authorities or legal processes. Here, there is a clear conformity with some of the key elements of moral panic: those proposing and enabling the ending of overseas transportation were, as in the case of Molesworth, known radicals. Equally, as Alan Hunt has pointed out, existing mass levels of disquiet about an aspect of culture or politics are always vulnerable to being capitalised on by individuals or groups acting as inciters, or what he labelled ‘moral agents’.[36] The role of the moral agent or entrepreneur, was to identify the relevant potential in a regularly existing atmosphere of dissatisfaction with a status quo to advance their particular agendas.[37] Such agendas could be overtly political where a clear moral case could be made with

[36] Alan Hunt, *Governing Morals. A Social History of Moral Regulation* (Cambridge University Press, 1999), p.15.
[37] Hunt, *Governing Morals*, pp.43-44.

either a local or a national remit and always rested on a broad cultural foundation. Mid-Victorian lawyers made good moral agents because they were experts in presenting issues relating to individual behaviour as possessing a threat to the moral security and actual stability of the community or the state. After all, a crime was an incident or episode involving offensive behaviour which became a crime because, under the law and its interpretation in the courts, that was what made such behaviour criminal instead of merely socially offensive or illegal under the terms of civil law.

The habit of using lawyers as reporters and journalists as both sources of information and for comment on the law in its daily operations spread rapidly in the national and provincial newspaper press from the 1850s.[38] Major – in the sense of busy – courts at all levels, including most London and urban provincial magistrates' courts and the Central Criminal Court, had lawyers, mainly barristers at the start of their careers, on salaries paid by one or more newspaper titles who gathered and presenting information for the press. In addition, more senior and experienced lawyers, who were also more experienced in writing for the media, acted as journalists commenting on particular issues in opinion pieces or through the editorials that were the leading articles of a day's edition. This enabled any issues which concerned the legal profession to be widely and consistently, but also anonymously, aired in print. The cloak of anonymous reporting ensured that the general public were unaware of the operation of any special interest in such sensational news stories and opinion pieces, with the consequent potential for distortion of the facts of the topic. Few outside the specialist circles of newspaper production or the law were aware of the extent of the professional legal interest involved in the presentation of law and law-related matters in the media, including the political dimensions. On a daily basis, editors looked to their legal journalists for editorials and other opinion pieces, giving the legal interest high profile but apparently disinterested coverage of their perspectives on a range of legal events in the courts, reported by other lawyers.[39]

6 Focusing on the Habitual Offender

Concerns about the incorrigible offender and his treatment were regularly and extensively voiced in the mid-Victorian print media (newspapers and periodicals

[38] Rowbotham, Stevenson and Pegg, *Crime News*, pp.23-34.
[39] Rowbotham, Stevenson and Pegg, *Crime News*, pp.25-28.

essentially). In editorials, articles, opinion pieces and letters to the editors, the national press kept their readers informed of the level of threat posed to them, individually and communally, by the habitual criminal or recidivist who, under the new plans, was to remain at home in Britain instead of being removed to a safe distance, for the health of the nation. Provincial papers took their tone from the national press and also echoed the concern in ways that localised and so enhanced the potential for alarm.[40] It is in this context that we need to read the consistent debates that appeared over a period of two and a half decades about possible strategies for the management of the threat identified as posed by habitual criminals who were now to be held within the community during their incarceration, and released back into it at the end of their punishment. The disquiet of a number of legal professionals on their impact on the community was channelled into discussions of the issue of whether or not prison worked as intended, producing reformed and useful members of society post-incarceration, or whether the penitentiary idea guaranteed the release of unreformed criminality back into society.

A measure of its popular impact can be gained from a high profile cynic about the reformability of incorrigible characters, Charles Dickens. He most famously voiced his hostility to Benthamite ideas in his 1850 publication, *David Copperfield*. An apparently irrelevant chapter (in terms of the narrative's main thrust) was added towards the end of the novel, where David and his friend Tommy Traddles, now a lawyer, visit a prison at the invitation of their former headmaster, Mr Creakle. There they meet up with the two consummate villains who had, throughout the narrative, repeatedly committed crime after crime until caught – Uriah Heep and Steerforth's manservant, Littimer. In the eyes of the prison authorities, these men are a shining justification of the prison system's rehabilitatory effects. However, the reader, seeing them through the eyes of David and Traddles, is left in no doubt that the authorities and prison trustees are deluded, Heep and Littimer remain consummate rogues who put on a veneer only of repentance and reformation.[41] Dickens' opinions carried weight with the public because they trusted his moral judgments.

The contemporary dimensions to the Victorian alarm over the potential effects of attempting to contain and so reform serious habitual criminality within Britain has been

[40] For a discussion of this, see Bartrip, 'Public Opinion and Law Enforcement'.
[41] Charles Dickens, *David Copperfield* (Penguin, 2011), Chapter 61: Two Interesting Penitents.

obscured to a considerable extent by the sustained emphasis in modern scholarship that is placed on desistance and deterrence and the various philanthropic and other strategies aimed at achieving this.[42] That, of course, was also a significant Victorian concern but its role in shaping the views of the day needs to be balanced by attention to the fears of those who rejected the rehabilitatory model long before the late nineteenth century establishment of scientific criminology in Britain. Traditionally, popular fear of crime had focused on the unidentified, and yet to be detained, criminal. In other words, those men, and some women, who were notoriously guilty of many crimes but only anecdotally and anonymously so, these were individuals who had not been arrested, tried and convicted. Historically, the majority of those figuring in broadsheets and the *Newgate Calendar,* if not the murderers of sweethearts, friends and family, were professional criminals shown to have substantial careers in law-breaking behind them. Once caught, society could breathe a sigh of relief as such threats to their daily security would be either executed or transported and so (hopefully) their threatening status would be eradicated. In this way had, Britain previously got rid, irrevocably but not inhumanely (in theory), of any incorrigible or someone thought to be potentially incorrigible. But no longer.

Feeling particularly well-qualified to pass comment, the legal profession felt itself duty-bound also to comment and pass judgment on the operations of the criminal justice process. The comment came from both supporters of a continuation of transportation, and those who believed it had been right to end it, and thus reflects a mix of motivations. Those advocating transportation to a fresh destination sought to critique the system being developed for penal servitude at home in ways that showed it as being ultimately unacceptable because of the damage it would cause to the moral fibre of British society. Those in favour of domestic penal servitude were also critical but with a commitment to making the new system work. The open acknowledgement by government figures that penal servitude at home would rarely involve a whole life tariff (except for some particularly heinous murderers whose death sentences had been transmuted for some

[42] See for example Barry Godfrey, *Crime in England 1880-1945: The rough and the criminal, the policed and the incarcerated* (Routledge, 2013), p.103, pp.143-146; Judith Rowbotham, '"Turning Away from Criminal Intent", Reflecting on Victorian and Edwardian Strategies for Promoting Desistance Among Petty Offenders', *Theoretical Criminology*, 13 (2009), 105-128.

reason) aroused considerable alarm from the start.[43] The fear was enhanced by the reality that at the start of the use of domestic penal servitude as the default sentence for those found guilty of indictable crimes, many terms of imprisonment were for as short a term as three years. It was not until amending legislation in 1857, confirmed in 1864 that a minimum period of five years was established, with longer periods of seven, fourteen or twenty-one years being more usually imposed from 1864 on.[44] From the start, manifestation of what was dubbed 'good' behaviour could see a reduction of incarceration time under the ticket-of-leave system, which effectively was early release on licence.

What both sides of the debate in the legal profession had in common was agreement that the introduction of this system, pioneered in Australia, was flawed in terms of how it was to be applied in the UK.[45] What was so particularly shocking to both the legal profession and, as a result of that profession's efforts to disseminate their opinions through the media, to the wider public, was the apparently indiscriminate use of the early release system written into the legislation. *All* those sentenced to penal servitude were eligible for release on licence if the prison authorities deemed they were ready, usually because of good demeanour in prison, to be released back into the community on a 'ticket-of-leave', regardless of the heinousness of their original offence.

7 The Ticket-of-Leave 'Menace'

This meant that, as the mid-century legally-informed newspaper reportage persistently highlighted, a constant presence in towns and cities would be those men (and some women) who were *proved*, by the legal process not rumour and anecdote, to be serious criminals with a real propensity to reoffend, producing a number of scares.[46] Either the panic caused by the release on licence into British society of convicted felons, or the

[43] Incurable insanity, for instance, or the belief that it was impossible to hang a particular offender 'humanely' as in the case of James Ruttaford, who had a thick scar on his neck which in the opinion of prison doctors meant that the executioner, Calcraft, would be unable to hang him humanely. See *Daily Telegraph,* 11 April 1870.
[44] Penal Servitude Act 1857; Penal Servitude Act 1864.
[45] See, for instance, 'Mr Jardine on the New Criminal Justice Act', *Morning Post*, 16 October 1855.
[46] See, for example, 'A Ticket of Leave Man', *Daily News*, 24 September 1855; 'Police Intelligence, Westminster', *Daily Telegraph*, 29 January 1856; Editorial: The Ticket of Leave Experiment, *The Times*, 12 August 1856; 'Social Science Association, Bradford: Punishment and Reformation', *Law Times*, 15 October 1860; 'The Ticket of Leave Man. Court of Queen's Bench', *The Era*, 6 June 1869.

extent of the recidivism produced by the new prison system has been the main focus of the literature to date.[47] It was intended to reassure that the public were reminded that the terms of their licence meant that ticket-of-leave men and women were required on release to report to their local police station, wherever that was, and were supposed to report monthly to the police for the first year after a ticket was granted to them. True also, the insistence was that the police and local magistrates had the power to revoke a licence and return a ticket-of-leave convict to complete their full period of penal servitude if they knew or suspected a return to criminality or a lifestyle which suggested this was pending.[48] Even had the system worked as intended, this was, for most legal professionals, insufficient as a guarantee that the welfare of society as a whole would not be negatively affected by the ticket-of-leave scheme, and they set about opposing it with a near universal voice. Roger Therry, the distinguished Irish-Australian barrister and jurist, warned in his *Reminiscences* that the English system 'did not correspond' to the system in the penal colonies – it was instead 'little short of an irregular, irresponsible and dangerous gaol delivery without the sanction of any judicial tribunal'.[49] Therry insisted that 'the most efficacious mode for the suppression of crime and the suitable punishment of criminals' would be found to be a return to transportation for 'the peace and security of society'.[50]

It was the 'crime-class' as Therry described them that was at the heart of the concern voiced in the courtrooms and reflected in the media.[51] A basic assumption pervaded the tone of the press reportage of individuals released into society on a ticket-of-leave, to the effect that as felons (i.e.: convicted of an indictable, not a summary, offence) they were persistent or habitual criminals, to use the terminology of the day. Ticket-of-leave and habitual became virtually interchangeable descriptors for those turning up in the summary and the higher courts, and this spread to their cultural profile in everyday society. Over the two decades after 1848, the negative and alarmist discussions of

[47] See for example Harling, 'Trouble With Convicts'; Bartrip, 'Public Opinion and Law Enforcement'; Cox et. al., 'On Licence'.
[48] See, for instance, Harling, 'Trouble with Convicts'; Clive Emsley, *Crime and Society in England, 1750-1900* 4th edn (Routledge, 2013), pp.189-190. Also 'Forethought for Winter Months', *Once a Week*, 15 November 1862, pp.569-574, laying out contemporary doubts on the efficacy of the system.
[49] Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (Sampson Low, 1863), p.500.
[50] Therry, *Reminiscences*, pp.482-483.
[51] Therry, *Reminiscences*, p.482.

habitual criminality became a constant feature of opinion columns, letters to the editors of local and national titles, and a variety of pamphlets. Isaac Holmes, for example, commented that 'In legislating for, or labouring among, thieves, the most important point to be attended to is, to adopt such measures as are calculated to prevent the young from becoming old thieves'.[52] It is necessary to emphasise the part played by the conscious, legally-managed strategy of using the print media to ensure a high degree of popular awareness of habitual criminality as a real and immediate threat, utilising the extensive literacy of the British population and its taste for sensational news items. In terms of literacy and consequent mass reliance on the press as a source of information for even the working classes in this period – it should be remembered that the establishment in the 1840s of three major Sunday newspapers, *Lloyds Weekly*, *Reynolds News* and the *News of the World* targeted this audience and did so as a commercial enterprise, not as a moral one. The publishers of these and more elite titles explicitly looked to make money from them and their willingness to include crime news of this type reflects an understanding that this was what the readership wanted, regardless of class.[53]

Increasingly, national newspapers were aimed at working class audiences, including the original *Daily Telegraph*, the first penny paper aimed at a radical working class readership from 1855. Such titles flourished commercially, as did urban local titles such as the *East London Observer* which also appealed to the working masses.[54] Equally, a survey of the titles of books, pamphlets and articles aimed at improving the quality of social life in Britain indicates the expectation of reading as the main source of information and ideas for all classes. Consider, for instance, the 1856 publication entitled *Publicity, The True Cure of Social Evils*, or *Let Every man Read: the Three Social Evils of Manufacturing Towns, and the Remedy Considered. By a Struggling Man*.[55] Jelinger

[52] Isaac Holmes, *Thieves, Beggars and Prostitutes, Published at the Request of the Committee of the Liverpool Female Penitentiary* (Deighton and Laughton, 1853), p.7.
[53] Judith Rowbotham and Kim Stevenson, 'Epilogue', in Judith Rowbotham and Kim Stevenson (eds.), *Criminal Conversations: Victorian Crimes, Social Panic and Moral Outrage* (Ohio State University Press, 2005), pp.270-271.
[54] Judith Rowbotham and Kim Stevenson, 'Introduction', in Judith Rowbotham and Kim Stevenson (eds.), *Criminal Conversations: Victorian Crimes, Social Panic and Moral Outrage* (Ohio State University Press, 2005, pp.xxv-ix; Michael Diamond, *Victorian Sensation or, the Spectacular, the Shocking and the Scandalous in Nineteenth Century Britain* (Anthem Press, 2003).
[55] Anon, *Publicity the True Cure of Social Evils. Liverpool Life: its pleasures, practices, and pastimes* (Egerton Smith and Co, 1856); Anon, *Let Every man Read: the Three Social Evils of*

Symons, in his examination of *Rough Types of English Life* reflected on the numbers who read newspapers, novels and articles and insisted that what flowed from 'thoughts and conversations illustrating the phases of opinion and feeling' in England was a greater impetus to reform.[56]

As a result of this dissemination of an affordable print media, an English and Welsh[57] readership of all classes became acquainted on an almost daily basis and on a grand scale with what constituted the 'modern' conceptualisation of a group of criminals who made a career out of law-breaking and who were depicted as posing a serious threat to community stability as a result of their depredations. Of course, the existence of a core 'class' or category of career criminals was not new in English popular mythology, as broadsheets and publications such as the *Newgate Calendar* make plain.[58] But the existence and threat of this group within society now became more 'real' and solid through being sensationalised as the novel 'threat amongst us', and one to be experienced on an escalating scale with the ending of transportation. This was partly as a result of the development of informed and authoritative crime reportage from the courts in the newly developing mass media of the mid Victorian era but partly also due to the development of new penal strategies, also widely reported in the media. Recidivism was not unknown before the mid Victorian era, but as a corollary of the determination of a pressure group intent on retaining a transportation system rather than domestic penal servitude, fear about habitual offending took on a new dimension from the 1840s on. The habitual criminal became a new bogeyman (or woman) for society thanks to the regular reportage of repeat offending by ticket-of-leave offenders. Even amongst those legal professionals favouring the end of transportation there was concern, producing a general agreement within the profession the ticket-of-leave system was the key problem in the management of habitual criminals.

Manufacturing Towns, and the Remedy Considered. By a Struggling Man (John Whitehouse Showell, 1858).

[56] Jelinger Cookson Symons, *Rough Types of English Life* (James Blackwood, 1858). Symons was another lawyer who favoured a resumption of transportation. See Jelinger Cookson Symons, *Tactics for the Times: as regards the condition and treatment of the Dangerous Classes* (John Olliver, 1849).

[57] It has to be added that the same holds true for Scotland and Ireland, but these are not considered here as the writ of law was different in these jurisdictions.

[58] See J.A. Sharpe, *Crime in Early Modern England* (Longman, 1999); Victor Neuberg, *Popular Literature* (Penguin Books, 1977).

Supporters of transportation and its resumption like Lord Campbell and Lord Brougham had, by the end of the 1840s, reluctantly agreed that, with the expansion of emigration there, the Australian colonies were no longer appropriate destinations. The expansion of empire meant that there were alternative destinations, making, such men believed, transportation a viable penal option. They pointed to the example of other colonial powers which were, contemporaneously, looking at returning to penal transportation overseas. Notable amongst them was France under Napoleon III, with the passage of their renewed transportation legislation in 1854. French Guiana, notably Devil's Island, in the South American Atlantic, and New Caledonia, in the Pacific and relatively near to Australia, were increasingly referred to as examples of how Britain could do likewise to find a location where it was highly unlikely that substantial numbers of emigrants would choose as a destination.[59] Having abandoned hope of a continuation of transport to any of the Australian colonies or to New Zealand as an alternative, this opened up the way for both supporters and opponents of transportation to agree that it had exerted, particularly in Van Diemen's Land (Tasmania), a negative effect on the free colonists. A key tactic for opponents of the ending of transportation was to highlight reports back from the penal colonies which indicated that free emigrants had suffered morally and practically from the presence of the convict establishments in their midst.[60] They drew an accompanying corollary that this would happen in Britain unless new destinations for its felons were found. The presentation they favoured was that which, ironically, had been used to argue the case for the ending of transportation to Australia: that the persistent or habitual criminal, who could or would not be reformed, had so damaged the moral fibre of the Australian colonies when they had been released either on ticket-of-leave or at the end of their sentences that it had been necessary to bring an end to transportation.[61] Now, the advocates of renewed transportation pointed out, what its critics had identified

[59] For more on the French experience, see Stephen Toth, *Beyond Papillon: The French Overseas Penal Colonies 1854-1952* (University of Nebraska Press, 2006).
[60] See, for example, G.E., 'Van Diemen's Land and the Convict System There', Letter to the Editor, *Daily News*, 5 January 1848.
[61] Molesworth, *Report*; Hughes, *Fatal Shore*, p.494. For more on the complex picture of rehabilitation and recidivism in the Australian penal colonies, see Hamish Maxwell-Stewart and Rebecca Kippen, '"What Is a Man That Is a Bolter to Do? I Would Steal the Governor's Axe rather than Starve": Old Lags and Recidivism in the Tasmanian Penal Colony' in James Campbell and Vivien Miller (eds.) *Transnational Penal Cultures*, (Routledge SOLON, 2014), pp.165–183, and the resources of the Digital Panopticon project online.

as the 'foul stream of moral pollution' criminals represented would afflict the Mother Country instead of the penal colonies.[62]

There was therefore, throughout the 1850s and 1860s, a sustained legal, and so popular, pressure on the government to seek alternative colonial destinations which would enable the continuation of transportation. The Falkland Islands were very seriously promoted as one possibility, something that could have had very interesting impacts on recent history![63] However, given the general acceptance within government, and particularly within the Colonial Office, that transportation was no longer a long term option for dealing with the incorrigible or recidivist offender, such legal pressure was never going to succeed in changing government policy. Successive administrations consequently insisted that they were more convinced by the statistics published by men like Colonel Joshua Jebb which indicated persistently low reoffending rates. This, it was officially argued, 'proved' the efficacy of the new prisons and their use of the ticket-of-leave system within a domestic penal servitude regimen, The early release on licence was, after all, a way of keeping the costs of a home-based prison regime under control. To the irritation of those legal professionals advocating a return to transportation, the regularly-voiced criticisms of the ticket-of-leave system and the associated alarms about its impact in the media did not produce the intended corollary of public support for this outcome.[64] Instead it led to a more domestically focused set of legal reforms aimed at the management of the habitual criminal.

8 Continuing the Outcry

These campaigners did not give up easily. What they continued to capitalise on was the established background of public unease about the limited experiment with penal servitude. Once the domestic ticket-of-leave system was in place, there was the prospect that on their release, real men like the fictional Heep and Steerforth, could continue their depredations on society. Dickens' negative dystopian vision took on an uncomfortable new reality as the alarm over the ticket-of-leave system took hold of the popular imagination from the mid-1850s. A resultant deeply-seated fear of this new type

[62] Editorial, *Exeter Flying Post*, 29 May 1851.
[63] See for instance, 'The Falklands Island and the Ticket-of-Leave System', *Morning Chronicle,* 7 April 1856.
[64] Eric Stockdale, 'The Rise of Joshua Jebb 1837-1850', *British Journal of Criminology,* 14, (1976), 164-170; Seán McConville, *A History of English Prison Administration* (Routledge, 1981).

of parolee was fuelled by publication of the numbers of tickets of leave granted (nearly 3,000 in 1856, for instance), and shared at most levels of society.[65] An examination of press coverage in titles ranging from *The Times* to the *News of the World* underlines the extent to which popular unease was given direction and substance by the uniformity of the messages contained in the reportage from the courts and the legally-authored editorial comment. Legal concern was advertised as being linked to the anonymity of those released on licence – such men and women had no distinguishing mark to indicate their felon status, and so were portrayed as being free to mingle more with an unsuspecting citizenry. Under the terms of the Penal Servitude Act 1857, those approaching the expiration of their sentence were permitted to grow their hair and on release were provided with a set of clothes that explicitly enabled them to mix freely with their law-abiding fellows. It is worth remembering that during this period, the 'new' uniformed police in London were still expected to wear their uniforms whenever they were outdoors, both on and off duty, to enhance their visibility within the community. It supposedly served to warn an otherwise unsuspecting citizenry that a policeman was amongst them, observing their actions and listening to their conversations.[66] Yet they were not to be warned that a released serious offender was amongst them, an interesting echo of the modern debate about the justifications for using the media (including social media) in identifying paedophiles in a neighbourhood.[67]

A steady number of cases reported from the summary courts featured further (if predominantly minor) offending being perpetrated by ticket-of-leave men and (though more rarely) women. Of course, this was a distortion to an extent in that not all cases heard in the summary or the higher courts made their way into print. It seems plain that one of the filters used to choose cases to feature in the daily columns was whether or not a trial featured a ticket-of-leave man or a convict who had completed a sentence of penal servitude and had then returned to former habits of offending. It turned a minor piece of law-breaking into something inherently more sensational, for a start. On 30 April 1856, for example, Henry Bennett, described as 'a notorious London thief, at large as a ticket-of-leave convict' appeared before the Liverpool magistrates. The actual charge

[65] See McConville, *A History.*
[66] Iain Channing, *The Police and the Expansion of Public Order Law in Britain, 1829-2014* (Routledge SOLON, 2015).
[67] Jenny Kitzinger, *Framing Abuse: Media Influence and the Public Understanding of Sexual Violence Against Children* (Pluto Press, 2004).

was of a minor misdemeanour, but the incident was reported at length and included news of Bennett's consequent remittance by the magistrates to a higher court, where he was convicted and returned to prison to complete his sentence.[68] The same paper, ironically, reported the reflection of the Governor of Dartmoor Prison on the ticket-of-leave system, that:

> Another year's trial of the license system affords an opportunity of referring to its results. Since the passing of the act for the discharge of prisoners on licence in this country 962 have been liberated, of whom 25 have had their licences revoked, and I have only heard of 5 who had undergone a new trial and are again the inmates of a prison.[69]

His comments do not seem to have changed peoples' minds, substantially because they were not seen as reflecting the reality of post-release offending by released felons. A decade later, *The Times*, reporting a 'Daring Burglary in Nottingham', commented that while the robberies were as yet unsolved, 'A great number of returned convicts and ticket-of-leave men have recently come into the town', plainly implying that the culprits were to be found amongst this body of men.[70] The reportage continued to highlight offending by repeat offenders and the accompanying journalism was for the most part, intractably hostile to the ticket-of-leave system. The result was that newspapers very efficiently gave the actually erroneous impression that crimes committed by released convicts constituted the majority of habitual offending.

Who, then, were these habitual criminals? The popular understanding was that the persistent or habitual criminal was one who was already a convict. By definition, to be a convict, whether released after completion of a sentence or on ticket-of-leave, meant that a man or woman must have been found guilty at the Quarter Sessions or Assizes of an indictable crime of such seriousness as to have warranted a term of penal servitude, rather than any lesser punishment. In an age that valued professionalism, the highest profile amongst those convicted were from this group of supposed 'career' or 'elite' criminals who committed property crimes including burglary from which they could expect to make a good living from the proceeds.[71] The reality was that this category

[68] *Daily Telegraph*, 30 April 1856.
[69] *Daily Telegraph,* 21 August 1856.
[70] *The Times*, 16 January 1865.
[71] Studies such as that by Godfrey et. al. have shown that the reality of such professionalism was illusory: however it was firmly accepted by contemporaries and so is taken at that value in this

comprised only a very small percentage of the law-breakers of the day, including the recidivists amongst them less than 6% of all convictions. Then as now, around 94% of all prosecutions were concluded in the summary courts thus the vast majority of repeat offenders were to be found **not** amongst the convict category but among those regularly found guilty of non-indictable and so relatively minor offences involving property or violence. Many of this incorrigible offending group were either petty or brutal criminals whose criminality had previously only been addressed in the summary courts, frequently through the provisions permitted in the Vagrancy Act 1824. This statute enabled magistrates, especially in collusion with the police, to target those considered locally to be idle and disorderly persons, rogues and vagabonds, and incorrigible rogues – something open to wide interpretation. On the whole, what a prosecution under the terms of the Vagrancy Act 1824 meant that these were nuisances to society, rather than hardened and incorrigible criminals! Technically, these repeat offenders were also habitual offenders but there was much more ambiguity about this type of petty career criminal as they did not, for the most part, 'graduate' to the higher courts in the period before 1869. That, however, was not the popular understanding of them, or the threat they posed.

Instead they were still used as an indicator of the threat posed by convicts because newspapers created a widespread conviction that sustained petty criminality was a key indicator to a move up the scale to more serious incorrigibility. Lord Stanley, quoted in a leader on vagrants in *The Times* in 1859, insisted that such figures, even when guilty only of petty crimes, were members of 'a race, not a profession only', adding that 'There is no fact better attested than the strong tendency of both pauperism and crime to become hereditary in certain families and localities'. The 'disorderly' private lives of those guilty of repeated petty offending was therefore a manifestation of their incorrigibility and their membership of a serious criminal category.[72] This became a self-fulfilling prophecy because it led to increasing demands to try such incorrigibles in a higher court for the 'offence', essentially, of being incorrigible rather than for any specific criminal action. Such tactics were established from the early 1850s as a measure for dealing with persistent juvenile offending thereby providing a model for adult petty incorrigibles.

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paper. See Barry Godfrey, David Cox and Stephen Farrall, *Serious Offenders: A Historical Study of Habitual Criminals* (Oxford University Press, 2010), pp. 12-16.

[72] Leader, *The Times,* 3 December 1859.

While there was a firm contemporary belief that habitual criminals constituted a single category, class or 'race' within society, the definitions discussed above suggest the actual breadth and diversity of recidivism in Victorian society, just as in modern society. There were constant attempts to classify criminals into groups which took account of the nature of both the crimes committed and the individual characters of the criminal. Leading such attempts were those legal professionals who believed that their experiences within the criminal justice process gave them particular insights. Such men constantly and consistently used the media, through newspaper letters, reports to meetings which then became 'news' and anonymous contributions to editorials to ensure the topic did not go away. A survey of the online sources reveals that around 13,000 extracts in *The Times* alone between 1855 and 1870 feature the phrase 'ticket-of-leave' as a news item of some kind relating to the discussion of the habitual criminal. There is also considerable cross fertilisation between national titles and provincial ones, so it was not merely a metropolitan London concern. It was as a result of *their* concerns that the popular understanding became established of the *dangerous* recidivist or habitual criminal as a member of a convict elite, and so someone who was a ticket-of-leave man (or occasionally, woman).

A careful and thorough study of the reportage of criminality confirms that it was the legal profession that was the most consistently and vociferously uneasy group about the 'experiment' of the ticket-of-leave system and the release of convicts back into society and that they paid little attention to the threat of the petty recidivist. There were exceptions: especially amongst those who worked most closely with or within the prison system, but they were the exceptions rather than the rule. For most legal professionals, the background to their expressions of disquiet in the newspapers was what was interpreted by them as a rise in crime consequent on the ending of transportation. As comment in the *Era* indicated, it was 'more than suspected' that 'crime is encouraged rather than prevented' by the system. The 'daily impression' produced by the reportage of crimes in the police courts was that the system was 'dangerous to society'.[73] The *Morning Post* firmly highlighted that 'some of our highest legal functionaries' including Lords Campbell and Brougham, had from the start voiced 'their decided disapprobation of the measure', and insisted that, with the system in place, 'it is impossible to deny that

[73] 'Inquiry into the Ticket-of-leave System', *Era*, 13 April 1856.

the anticipations they then formed have been to a great extent realised'.[74] Brougham's letter to the Law Amendment Society meeting in December 1856, published in full in *The Times* referred to the ticket-of-leave system as a 'very discreditable peculiarity'. Frederick Hill's paper on 'The Means of Freeing the Country from Dangerous Criminals' was more measured in accepting that penal servitude could not yet be shown to have failed, but insisted that it was essential to ensure that 'terms of imprisonment [were]... fully equal to those of transportation' by repealing the ticket-of-leave provision.[75] The emphasis was always the claim that the system, while well intended, could not work to the advantage of respectable society. As the barrister author of a letter to the *Daily News* reflected, it was widely agreed it was an experiment, albeit one he argued that would be shown to have failed when Parliament conducted a proper investigation.[76]

9 Parliamentary Scrutiny and Habitual Criminality

Under such pressure, a parliamentary inquiry was set up in 1856. As the newspapers duly reported, one of the most vehement supporters of the experiment was Colonel (later Sir) Joshua Jebb, whose Report on convict prisons 1854-55 was presented to Parliament at the same time as the inquiry sat. Jebb's opinion was that 'one thousand prisoners discharged from the convict prisons, after so long being subject to a course of corrective discipline, would not do so much mischief to the public as any other thousand 'taken indiscriminately from among those who are discharged from the gates of our large [ie non convict] prisons'. He hoped that his statements and statistics would 'serve to allay some of the fears which were created by the publicity given to the [occasional] relapse of the law, while the good conduct of the many was wholly unregarded'.[77] Jebb's opinions were based on the returns such as those provided by the Governor of Dartmoor Prison and other national institutions, so the hope was that such official statistics would calm the popular panic. They complimented and supported other judicial statistics, and these were regularly presented for public consumption via the press. The Introduction to the Criminal Statistics for 1858 painted a positive picture, suggesting that though transportation had diminished, the figures currently indicated that the current system was promoting the 'absorption of large numbers of discharged prisoners in honest

[74] Leader, *Morning Post*, 13 December 1855.
[75] 'Dangerous Criminals and the Ticket-of-leave System', *The Times*, 17 December 1856.
[76] 'The Ticket-of-leave System', Letter to the Editor, *Daily News*, 1 November 1855.
[77] Joshua Jebb, *Report on the Discipline of Convict Prisons and the Operation of the Act 16 and 17 Vict. c99*, cited in, for instance, *The Times*, 8 August 1856, and the majority of other national and local newspapers around that date.

employment'.[78] However, this attempt at reassurance did not serve to assuage the ongoing demand for either an abandonment of the ticket-of-leave system or a substantial amendment to its terms of operation, in order to safeguard the public.

There were certainly good grounds for the public concern, as the legal critics were ready to highlight. As Godfrey, Cox and Farrall point out the contemporary statisticians of the mid-Victorian period were perfectly conscious of the limitations and inaccuracies in the official figures, but believed they had value even so as an indicator of diminishing criminality within the UK.[79] Other commentators, especially those advocating a resumption of transportation, were less sanguine. One evangelical reformer, Thomas Plint insisted in 1851 that, relative to the size of the population, the criminal class was increasing.[80] Amongst the prominent legal campaigners doubting the official figures for the sound working of the ticket-of-leave system were Jelinger Symons and Matthew Davenport Hill, who noted his regret at the figures placed before the public in that, in his experience, 'the *data* for such calculations is non-existent'.[81] This sense that there was a serious gap between the reality of crime as it affected the citizenry of the country in their daily lives and what was being claimed officially manifested itself most significantly through the criticisms of the ticket-of-leave system and its management. That this was being poorly done in many localities was difficult to deny. There was a lack of the promised facilities for monitoring and supervising individuals released back into society where (rejoining the fellow members of their criminal class) they acted as 'a pestiferous canker…lowering, more or less, the moral status of all who came into contact with them'.[82] Matthew Davenport Hill, for example, instituted an enquiry in Birmingham in 1855 to reveal the realities of the system in his town of approximately 250,000 inhabitants. As he told the Select Committee, he was informed by the police that a mere 14 were known to be present in the town, clearly a gross under-reporting of any realistic expectations of numbers.[83]

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[78] 'Return of Judicial Statistics of England and Wales, 1858 (Parts I. and II.)', *Parliamentary Papers*, 1859, No. 2508, Vol. 26, 339-559 (p.349).
[79] Godfrey, Cox and Farrall, *Serious Offenders*, pp.69-71.
[80] Thomas Plint, *Crime in England: Its Relation, Character and Extent as Developed from 1801-1848* (Charles Gilpin, 1851), p.140.
[81] Matthew Davenport Hill, *Suggestions for the Repression of Crime contained in addresses to Grand Juries of Birmingham* (John W Parker and Sons, 1857), pp.589-590.
[82] Plint, *Crime in England*, pp.146-147.
[83] Hill, *Suggestions*, pp. 590-594; Bartrip, 'Public Opinion and Law Enforcement', p.164. Hill was an interesting character in that he approved in principle of the idea of the ticket-of-leave system

Despite the evidence provided by men like Hill, the Report of the 1856 Select Committee not only endorsed Jebb's comments that the current system was both effective and equitable, but also recommended its expansion. The legal profession were not happy and made this plain through continuing newspaper reportage. At the start of the autumn Birmingham Quarter Sessions, the Recorder, Matthew Davenport Hill, discussed the 1856 Report in an address which was widely circulated in the national and local press. He insisted that 'it cannot be denied that the public had very reasonable grounds for complaint and misgiving'. Even if the majority of those released would not offend, the management of the system was such that it was still too easy for ticket-of-leave men to evade the necessary supervision by the police. He cited again the example of Birmingham where the police, after their best efforts, still had no firm idea but only 'suspicions' about the numbers of ticket-of-leave men living within the city.[84] As the *Morning Post* reported, Hill was not the only vocal critic. In February 1857 no less a figure than the Lord Chief Justice, Lord Campbell, urged the government to abandon the practice of domestic ticket-of-leave and reinstate transportation to a new destination such as the Falkland Islands.[85] The government, however, firmly declined to do so. In the Penal Servitude Act 1857 its policy reflected instead the advice of the 1856 Select Committee Report. Consequently it expanded, rather than abandoned, the ticket-of-leave license system, as the fairest and most cost effective way forward.

After the passage of the 1857 legislation, the intensity of the popular furore died down to an extent, partly because of the expansion of the uniformed police forces, especially the county forces, which did attract an amount of approving media comment and optimism about improvements to the threat posed by habitual criminality through enhanced detection of this by the expanded police numbers. Yet the topic of felons in society remained a cause of concern amongst legal commentators who were less convinced that the expansion would have a real effect. Though Jelinger Symons died in 1860, other vocal critics like Matthew Davenport Hill continued their critiques, highlighting their perception of the ongoing threat of the ticket-of-leave men, insisting that such individuals

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but deeply disapproved of the way that it was being managed in England and Wales. See Hill, *The Recorder of Birmingham*, pp.12-14.

[84] The terms of the reportage was largely consistent, suggesting that Hill provided a paper copy of his address for legal reporters. See for instance, 'The Ticket-of-leave System', *Daily News*, 27 October 1856.

[85] Leader, *Morning Post*, 6 February 1857.

represented habitual criminality. Faced with this constant criticism, Colonel Jebb responded by sending letters to a number of newspapers detailing what he insisted were the continuing successes of the licence system.[86] His best efforts were insufficient for a variety of reasons. For example, a publicity stunt by the journalist Henry Mayhew served to enhance popular fears when he sponsored a meeting in London of ticket-of-leave men, where they asserted how difficult it was to find employment and support that would enable them to remain law-abiding, and so justifying – and confirming – their taste for anonymity.[87]

With the majority of those in the legal profession still using the press to highlight its flaws, it is not surprising that neither the 1857 Act nor the assurances of its supporters, had much real impact on popular attitudes. What instead sustained public alarm were the continuing regular reports, particularly from the magistrates' courts, which continued to feature ticket-of-leave men, depicting them in unflattering terms that made them seem ever more physically, as well as morally, threatening. In a typical example, Mr Selfe, the stipendiary at the Thames Police Court, commented on 'the danger to society' of the system, when trying 'a dangerous trio' of convicts on a suspicion of planning a highway robbery.[88] As the press had reflected in response to Jebb's complaints in the run-up to the passage of the 1857 legislation, the reality was that, even if the system had not received a full or fair trial, it had been condemned 'rightly or wrongly, by the voice of public opinion' damaging the operation of the criminal justice system.[89] Jebb and his supporters in and out of government continued to point to their officially endorsed statistics of the low numbers of individuals reoffending as a demonstration of the effectiveness of the ticket-of-leave system, and to insist that these figures on known convict recidivism represented the reality, but in vain. His explanations only 'irritated' a 'justly exasperated public', according to one typical newspaper comment.[90]

[86] See, for instance, 'Colonel Jebb on Ticket-of-leave and Secondary Punishments', Letter, *Morning Post*, 9 January 1857.
[87] This was widely reported in the national and provincial press. See for example, 'Meeting of Ticket-of-leave Men', *The Times*, 28 January 1857.
[88] 'Ticket-of-leave Results – A Dangerous Trio', *Morning Chronicle,* 15 July 1858.
[89] Leader, *Morning Post*, 6 February 1857.
[90] Sir Joshua Jebb's Defence of the Ticket-of-leave System', *Sheffield and Rotherham Independent,* 24 November 1862.

That exasperation was heightened when the next crime panic came along in the shape of the 'garrotting' panic from 1861 to 1863. Once again it was the continued existence of the ticket-of-leave system that was blamed, as well as the ineffectiveness of the police. The reportage from the courts fostered the firm popular belief that garrotters were either already ticket-of-leave convicts or on the verge of becoming so. John Evelyn Dennison, in his capacity as Foreman of the Grand Jury at the Nottingham Assizes, presented a memorial to Baron Bramwell in which he said the Jury was 'confirmed in the opinion that the system, to the extent now practised, is a failure in the essential points for which it was established, both as to the reformation of criminals and the protection of society'.[91] As was also widely reported, Bramwell himself mounted no defence and Justice Mellor joined in the attack in his address to the Worcester Assizes, reflecting that 'he could not say it was a good system'![92]As in the previous decade, it had its effect on politicians, especially after it was brought home to them by a garrotte attack on one of their own, Mr Hugh Pilkington, the MP for Blackburn.[93] Much has been written on both the garrotting menace and this particular attack so it is not proposed to examine this here, but only its use by the legal commentators hostile to domestic tickets-of-leave as supporting habitual criminality.[94] The opinion columns agreed that continuation of the system without amendments meant the English people suffered 'injustice' from this attempt at criminal reformation, and exhorted voters to exert pressure on their elected representatives to bring about its abolition. As the *Era* thundered in September 1862, the 'dangerous condition of our public highways' was 'perfectly scandalous' and clearly resulted from the 'disgraceful habit of petting criminals' by letting them out early on a ticket-of-leave.[95]

It was reported in December 1862 that, influenced by the July garrotte attack on Pilkington, the Speaker of the House joined the public criticism of the ticket-of-leave

[91] Mentioned in 'The Speaker of the House of Commons and the Ticket of Leave System', *Birmingham Daily Post*, 8 December 1862.
[92] See for instance, 'Judicial Condemnation of the Ticket-of-leave System', *Essex Standard*, 10 December 1862; also 'Mr Justice Mellor on the Ticket-of-leave System', *Sheffield and Rotherham Independent*, 13 December 1862.
[93] 'Murderous Attack on Mr Pilkington, MP', *The Times*, 18 July 1862.
[94] See, amongst others, Jennifer Davies, 'The London Garrotting Panic of 1862: A Moral Panic and the Creation of a Criminal Class in mid-Victorian England', in V.A.C. Gatrell, Bruce Lenman and Geoffrey Parker (eds.), *Crime and the Law: The Social History of Crime in Western Europe since 1500* (Europa Publications, 1980), pp.190-213; Helen Johnson, *Crime in England, 1815-1880: Experiencing the criminal justice system* (Routledge, 2015), pp.32-35; James Winter, *London's Teeming Streets 1830-1914* (Routledge, 2013), pp.60-62.
[95] 'The Ticket-of-leave Rascals and How Long are They to be Endured?', *Era*, 7 September 1862

system.[96] In January 1863, Stockport sent a petition to the Commons demanding the repeal of the system and once again transportation moved up the legal agenda.[97] As a result of this pressure, the Royal Commission to Enquire into the Acts Relating to Penal Servitude and Transportation was commissioned at the start of 1863, taking evidence from February on, even while *The Times* commented with satisfaction that it was this, as much as the lighter evenings, that had served to diminish the spate of garrottings that had made the recent winter so hideous.[98] The Commission reported in on 20 June 1863, and the result did provide some comfort to the promoters of a restoration of transportation, The Report agreed that it was

> highly desirable to send convicts, with proper regulations, and without disguise, to a thinly-peopled colony, where they may be removed from their former temptations, where they will be sure of having the means of maintaining themselves by their industry if inclined to do so, and where facilities exist for keeping them under more effectual control than is practicable in this country, with its great cities and large population. This mode of disposing of convicts affords by far the best chance of making them useful members of society. We therefore think, that removal to a penal colony should be the ultimate destination of as many as possible of the convicts who are fit to be sent out.[99]

It was also suggested that convicts might be encouraged to emigrate freely on completion of their sentences, in order to improve their chances of securing work.

However, disappointingly for witnesses to the Commission like Sir Richard Mayne, it was not considered advisable that 'sentences of transportation as a distinct sentence should again be passed by judges' in that, thanks to free emigration, the deterrent effect had been dissipated.[100] Even more disappointing the Commission dismissed the idea of setting up a new penal colony (even though it discussed approvingly the French strategy of so doing) and mentioned the Falklands only as a possibility should it be decided to construct a naval docks there.[101] The emphasis, at length, was on the benefits to both Britain and the colony of continuing transportation of convicts to Western Australia – but only after (in an echo of the Irish prison and ticket-of-leave) a carefully managed period

[96] 'Murderous Attack on Mr Pilkington, MP', *The Times*, 18 July 1862.
[97] *Manchester Guardian*, 12 January 1863.
[98] Leader, *The Times*, 13 February 1863.
[99] *Report of the Commissioners Appointed to into the Operation of the Acts relating to Penal Servitude and Transportation*, 2 vols., (Eyre and Spottiswood, 1863).See Vol. I, p.34.
[100] *Report of the Commissioners Appointed to into the Operation of the Acts*, p.36.
[101] *Report of the Commissioners Appointed to into the Operation of the Acts*, pp.34-36; 67.

of detention in an English (and by implication, a Scottish) prison, where they could 'earn' the right to finish their sentence in the penal colony.[102] Lord Cockburn, the Lord Chief Justice, deeply disapproved of this recommended compromise – he had even declined to sign the Report because of his continuing hostility to the way in which penal servitude worked at home (something he explained at length in his dissenting memorandum).[103] That memorandum also exposes the extent of dissatisfaction within the legal profession (and the police) about the ticket-of-leave system and the lack of a deterrent message sent by the realities of penal servitude served in England and Wales.

However, to the chagrin of the Commissioners, their Report hastened the closing down of the Western Australian option. The colony voiced its vehement objection to the recommendation for continuation and expansion of transportation there, and this essentially permitted the government to ignore the Commission's predilection for a continuation of a form of transportation by looking for an alternative venue.[104] It was backed in its stance by the other Australian colonies, with an Anti-Transportation Conference (not attended by Western Australia) having being held in Melbourne at the same time as the Royal Commission was meeting in London, to protest against the 'abominable practice' of convict transportation.[105] Instead, the official focus was now to be on improving the domestic system by making sentences harsher and ticket-of-leave better managed (partly by making it harder to attain).[106] Seeking to assuage public panic, the Security of the Persons of Her Majesty's Subjects from Personal Violence Act 1863, popularly known as the Garrotters Act, had been rushed through Parliament, legislation which authorised the courts to impose flogging of up to 50 strokes, accompanied by sentences of up to two years hard labour for robbery with violence. The following year, the more considered Penal Servitude Amendment Act 1864 was passed, drawing not only on the Royal Commission Report of 20 June 1863 but also on the Lords' Committee

[102] *Report of the Commissioners Appointed to into the Operation of the Acts*, pp.40-51.
[103] *Report of the Commissioners Appointed to into the Operation of the Acts*, pp.79-87.
[104] For a history of this, and Cardwell's announcement in November 1864 of the cessation from 1868 on, see Editorial, *The Times*, 9 February 1865, discussing the events since 1863 as highlighted in the papers on the matter presented to Parliament.
[105] *Minutes, Intercolonial Conference held in Melbourne, in the months of March and April 1863*, (John Ferrer, 1863), at https://www.parliament.vic.gov.au/papers/govpub/VPARL1862-63NoA29.pdf [Accessed 18 November 2018].
[106] *Minutes, Intercolonial Conference held in Melbourne*, pp.23-25.

on Prison Discipline, chaired by Lord Carnarvon, which had arisen out of his criticisms (widely disseminated in the press) about the laxity of prison discipline.[107]

The 1864 legislation, together with the Prisons Act 1865, sought to further defuse the crisis created by formal notice of the ending of transportation and the ongoing legal criticism of the inefficacy and lack of deterrent value of domestic penal sentences. A minimum tariff of five years for penal servitude, extended to seven for a repeat offence was fixed under the 1864 Act. It also gave the police enhanced powers of supervision and created as an offence the failure to report correctly as required under the terms of the licence. Yet from the perspective of both the public and the legal profession this was still perceived as insufficient. The proponents of transportation did not immediately give up their attempts to make the government change its mind and establish a new penal colony. For a start, sentences of transportation continued to be passed by the English and Welsh courts up to 1868, leaving the mechanism for continuation apparently still in place. Constance Kent, who confessed in 1865 to the murder of her infant half-brother in 1861, was one such. Her mandatory death sentence was commuted to transportation to Australia for life.[108]

This encouraged a continuation of advocacy in the media in favour of the time-honoured method of ridding the country of her 'moral burden' of criminality. Lord Carnarvon noted his disappointment in the ending of transportation and his belief in its deterrent quality in a debate in the Lords on 3 May 1866.[109] In August and November 1867, the Middlesex magistrates agreed to send a petition to the Home Office urging the resumption of transportation.[110] The *Liverpool Mercury* noted with satisfaction in the same month that a gang of French hotel burglars which had bothered England had finally been broken up

[107] Carnarvon was a Hampshire Justice of the Peace who had been highly critical of a too 'liberal' prison regime obtaining in Winchester Gaol. See 'Prison Discipline and the Hampshire County Magistrates', *The Times*, 6 January 1863; 'Lord Carnarvon has done the public good service', Editorial, *The Times*, 8 January 1863. 'Treatment of Criminals – Gaol Discipline', *Reynold's News*, 18 January 1863.
[108] It was suggested that with the commutation of Kent's death sentence she would be transported to Western Australia, and benefit from a ticket-of-leave there. 'News of the Day', *Birmingham Post*, 31 July 1865. See also the transportation for seven years of Hubert Poole for arson at the offices of the *Daily Telegraph*, 'A Case of Arson', *Standard*, 13 April 1865.
[109] 'House of Lords, Thursday 3 May', *The Times*, 4 May 1866; Editorial, *The Times*, 5 May 1866.
[110] 'Meeting of Middlesex Magistrates', *Morning Post*, 16 August 1867. 'Meeting of Middlesex Magistrates', *Morning Post*, 30 November 1867.

by the French – who had transported them to Devils Island.[111] The Discharged Prisoners' Society contained a number of continuing critics of the penal servitude system post 1864. Charles Adderley, the Parliamentary Under-Secretary of State for the Colonies 1866-68, and mover of the Garroters Act 1863, insisted that in the wake of the cessation of transportation, 'they had seen the Legislature attempting shift by shift to provide a substitute for transportation, and they had seen every attempt fail'. He was thankful for the emigration department of the Society, acting now as the only form of transportation, and thereby giving his only chance of 'honest livelihood'.[112] According also to the Canadian colonial press, there was an ongoing attempt to find alternative venues. In a piece quoted in the *Bradford Observer*, the merits of Vancouver Island as a new destination was discussed, with an assurance that this would be welcomed there as a source of 'able-bodied immigrants', should Mr Cardwell open negotiations.[113] The fact that this was a seriously considered option amongst supporters of transportation is further confirmed by a letter from the noted penal reformer William Tallack advocating both continued transportation and Vancouver as a destination.[114]

This obduracy on the part of leading members of the legal profession, including Lord Cockburn, and their supporters in and out of politics, made even more complex the challenge of making the domestic system both workable and acceptable. The Irish system, with its 'intermediate' stage of supervision on release had been promoted as a possible way forward in the Report of the 1863 Commission, though ideally in the context of transportation to Western Australia.[115] A version of it, at least in terms of improved supervision, was a feature of the 1864 legislation. Matthew Davenport Hill (once again) did comment to the Birmingham Quarter Sessions that 'the amended Act is found to possess an advantage over the former Act in the power it gives to the police to at once arrest and take before a magistrate any license holder found violating the terms of his license'. But, with the police all too often ignorant of the identities of ticket-of-leave men in their territories, Hill urged the need for 'some uniform system of supervision over the license holders'.[116] Another critic of the 'improved' system post 1864 was Charles

[111] 'Notorious Gang', *Liverpool Mercury*, 12 January 1865.
[112] 'Discharged Prisoners and Society', *Birmingham Daily Post*, 4 February 1865.
[113] 'Vancouver Island and the Convict Question', *Bradford Observer*, 30 March 1865.
[114] 'British Columbia and Vancouver Island', William Tallack, Letter to the Editor, *Daily News*, 27 August 1866.
[115] *Report, Penal Servitude and Transportation*, I: pp. 19-22.
[116] 'The Ticket-of-leave Class', *Liverpool Mercury*, 12 April 1865.

Pennell Measor, the former Deputy Governor of Chatham Prison and one of the witnesses to the 1863 Royal Commission. He commented acidly in 1865 that the 1864 legislation had simply raised the costs of penal servitude rather than improving convict discipline.[117]

It is in the continued condemnation of the system exemplified in the critical legal comment disseminated through the media, that the roots of the specific habitual criminals legislation passed in 1869 lie.[118] William Merry, one of the visiting justices at Reading Gaol, took the opportunity of addressing the Berkshire Quarter Sessions in January 1869 on the 'present unsatisfactory system of granting tickets of leave'.[119] Walter Crofton was crucially responsible for promoting the scheme based on a version of the so-called Irish system he had implemented in Western Australia that was eventually enacted as the Habitual Criminals Act 1869, but it was another example of hastily conceived legislation, in response to the levels of public alarm that were being sustained by hostile media comment. In 1868, the incoming Liberal government had taken up the baton of further reform of the penal servitude system but not in a way that would see a resumption of penal transportation. For a start, it would have been a betrayal of those values which had seen an earlier Liberal administration start the process of ending transportation, back in 1838.

While the administration claimed it was not 'activated by any feeling of panic and alarm' it undoubtedly was nervous of the newly enfranchised urban working classes and very aware of the potential that the high levels of legal hostility to the ticket-of-leave system could stir up amongst these new voters. Lord Kimberley, shortly to become Secretary of State for the Colonies but then still involved in Irish affairs, introduced a Habitual Criminals Bill into the Lords, where – instead of going into committee – it was fully discussed on the floor of the House during its Second and Third Readings. [120] The majority of criticism of the proposed legislation came from non-lawyers such as Lord Salisbury, but it was heartily endorsed by Hatherley, the Lord Chancellor, amongst

[117] 'The Remedies for the Cessation of Transportation', C.P. Measor, Letter to the Editor, *The Times*, 4 January 1865.
[118] See, for instance, *Manchester Times*, 23 September 1865.
[119] 'Ticket-of-leave System', *Essex Standard*, 15 January 1869.
[120] Earl of Kimberley, HL Debates 26 February 1869, vol. 194, cols. 332-350; and discussion in HL Debates 5 March 1869, vol. 194, cols. 692-715.

others.[121] A leader in *The Times* in April 1869 accepted that this, too, was 'an experiment in legislation', but insisted that it was impossible to establish that 'it is one either uncalled for or unlikely to be successful'.[122] After a hiatus in the Commons, it was formally enacted in summer 1869, coming into operation in August that year amidst high hopes in the newspapers, indicating the satisfaction of at least a majority of the legal profession with their success in ensuring at least that the penal regime would be more severe, especially in the way that repeat offenders would be treated.

Conclusion

In the end, the Habitual Criminals Act 1869 was certainly unsuccessful on its own terms, as the police forces were overwhelmed by the task of maintaining an accurate record of the 5,000 plus individuals subjected to police supervision under the terms of the Act after its immediate implementation from 11 August 1869 to the end of that year. The Act was rapidly modified by the Prevention of Crimes Act 1871 in an attempt to make it more manageable. The impact of the consistent legal criticism and a need to win over the newly-enfranchised urban artisan voter explains why the 1869 legislation was hastily rushed onto the Statute Books. It did enable the government to show it was 'doing something' to deal with crime levels. Its failure helped facilitate a soberer assessment of crime and criminality later in the century, but its enactment shows very clearly the impact of an engagement between the consumers and producers of the media when it concerns crime.

However, what the 1869 legislation did was finally end the campaign for the restoration of penal transportation to a new destination, whether the Falklands or Vancouver Islands. The intention of those legal professionals who had determined to use all means at their disposal, but particularly the news media, had been to ensure a mass popular movement demanding the restoration of transportation. That mass support did not materialise, very largely because it had become entrenched in the popular mind that transportation was a form of slavery. The last serious mention of the possibility of a resumption of transportation can be dated to the early 1870s. However, what cannot be ignored is the reality that had the supporters of transportation succeeded in their intention of creating a pressure group with substantial popular support in the UK, the

[121] Ibid.
[122] Leader, *The Times*, 7 April 1869.

government might indeed have invested in a further phase of penal transportation overseas. It was only the lasting legacy of the successful association created between transportation and slavery in the popular mind back in the 1820s and 1830s that prevented this from happening.

However, if the supporters of transportation failed in their actual objective, they certainly succeeded in creating an unforeseen consequence with significant implications to this day for the understanding of the penal system and the potential for desistance amongst the criminal population of the country. What was a clear outcome of the campaigning highlighted in this article was the creation of an unnecessary level of alarm within Britain over the threat posed by the habitual criminal and the ticket-of-leave system which had the effect of exaggerating both the scale of the criminality involved and the level of threat posed by recidivism. It had the short term effect of ensuring a reforming Liberal administration felt impelled to pass ill-considered legislation, which failed and had to be withdrawn in its original format. One of the more enduring and negative effects of this campaign to demonise the offender was to make it more difficult in practical terms for the incarcerated to reintegrate into society and demonstrate their rehabilitation. Without the direct and deliberate input of members of the legal profession with their own agendas, it is highly unlikely that anything beyond a few, relatively short-lived, episodes of alarm, such as those of the 1860s on juvenile delinquency or garrotting would have manifested themselves. These would have certainly been unlikely to have had the coherence and consequence that the proponents of transportation bestowed upon such episodes, in the interests of creating and sustaining alarm over the habitual criminal and denigrating the potential of the domestic penal servitude system to work. As reportage in the tabloid and the broadsheet press in the last two years underlines, the debate over whether or not prison works remains vital in the early twenty-first century. [123] So too, ironically does the legacy of alarm in the current fears about 'Wild West Britain'.[124]

[123] See, for example, Christopher Hope, 'Prisons No Longer Places for Punishment, Say Ministers', *Daily Telegraph*, 13 April 2017; Polly Toynbee, 'Squalid Prisons Are Just the Start', *The Guardian*, 21 August 2018.
[124] Alice Hodgkins-Brown, 'Wild West Britain Out of Control', *Daily Express*, 1 November 2018; 'The Bloody Face of Wild West Britain', *Daily Mail*, 5 October 2018; Ian Drury, 'Police Receive £600m Cash Boost From Taxpayer to Crack Down on Violence in Wild West Britain', *Daily Mail*, 30 November 2018.